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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICHARD WALTON SWARTZ, Defendant and Appellant.	G042331 (Super. Ct. No. 07NF3204) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Hoffer, Judge. Affirmed.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Marilyn L. George and Lilia E. Garcia, Deputy Attorneys General, for Plaintiff and Respondent.

Richard Walton Swartz was convicted by a jury of rape by means of force, violence, duress, menace, and fear of immediate and unlawful bodily injury (Pen. Code, § 261, subd. (a)(2))[1] (count 1); commission of a lewd and lascivious act upon a child under 14 years of age (§ 288, subd. (a)) (count 2); and continuous sexual abuse of a child under 14 years of age (§ 288.5, subd. (a)) (count 3). Additionally, the jury found true section 667.61 allegations that in the commission of counts 1 and 2, Swartz personally inflicted great bodily injury in violation of sections 12022.7 and 12022.8. On appeal, Swartz contends there is insufficient evidence to support a finding of duress on count 1, and evidence of Child Sexual Abuse Accommodation Syndrome should not have been admitted. We reject both contentions and affirm the judgment.

FACTS

Jane Doe lived with her mother, Mary, her grandmother, and her younger sister in a three-bedroom condominium. Swartz, the grandmother's boyfriend, moved into the home around 1995 when Jane Doe was between the ages of three and five years old, and lived there for about 10 years.

Swartz and Jane Doe's family would often go to the desert to ride dirt bikes. Sometimes Swartz and Jane Doe would make the trip alone. When Jane Doe was six or seven years-old, Swartz took her to Sea World alone. Beginning around the same time, Jane Doe and Swartz would ride bicycles together in the park and visit the beach.

When Jane Doe was 13 years old, she gained a considerable amount of weight. Mary initially attributed Jane Doe's weight gain to her eating habits. Eventually she began to suspect her daughter might be pregnant and suggested she take a pregnancy test. Jane Doe refused.

In February 2007, a few days after Jane Doe turned 14, Mary called her cousin, T.R., who was a nurse. T.R. came to the home and attempted to persuade Jane Doe to take the pregnancy test. Jane Doe was visibly upset and refused. T.R. was convinced

[1] All further statutory references are to the Penal Code.

Jane Doe was pregnant (from the appearance of her stomach), and she took Jane Doe to the hospital. Tests revealed Jane Doe was six-months pregnant.

Two days later, Jane Doe revealed the father's identity. Mary had called T.R. for help because Jane Doe was upset. When T.R. called Jane Doe and asked why she was crying, Jane Doe responded "[Swartz is] stupid." T.R. asked if Swartz had said or done something to her; Jane Doe replied, "'I'll call you back.'" Seconds later, T.R. received a text message from Jane Doe reading, "I [*sic*] someone to hurt [Swartz]. He's the one that did it to me. He said if I tell, he will hurt me." T.R. forwarded the text message to Mary and then came to the house to retrieve Jane Doe.

The police interviewed Jane Doe the same night she revealed it was Swartz who had impregnated her. In the interview, Jane Doe recounted a sexual encounter between her and Swartz that occurred in November 2006 and claimed it was an isolated incident. Jane Doe gave birth to her child in May 2007. After giving birth, she developed blood clots and underwent surgery.

A few weeks later, police interviewed Jane Doe again. In the second interview, contrary to her prior statement, Jane Doe said Swartz had been having sex with her approximately twice a week since she was eight years-old. Jane Doe told officers she withheld this information in her first interview because she was nervous.

At trial, Jane Doe testified her sexual relationship with Swartz began when she was eight years-old, and continued, approximately twice a week, until she was 14. Jane Doe explained when she was in her room alone, Swartz would enter and shut the door. He would tell her to be quiet while removing her clothes. He would then push her down on the bed and have sexual intercourse with her. Jane Doe testified that sometimes she would tell Swartz "to stop," though he would say nothing and continue. When Jane Doe did not tell him to stop, she said it was because "it never worked;" she maintained she never consented to sex with Swartz. Jane Doe was asked "did [Swartz] ever tell you that anything would happen to you if you told someone?" She replied, "He would hurt me if I told." Jane Doe

testified Swartz said this on more than one occasion and she "kind of" believed it. When asked, "Would you otherwise have allowed the sexual intercourse to happen?" Jane Doe replied, "No." Jane Doe testified Swartz was stronger than she was and could hurt her if he wanted. She testified to prior altercations with Swartz, unrelated to any of the sexual encounters, in which he hit her.

Jane Doe testified about a sexual encounter with Swartz that occurred in the first week of November 2006. She said the incident was consistent with the "way it normally happened," and it was "basically the same process" that unfolded on multiple occasions between July and November of that year. Jane Doe testified it was a school night and she was alone in her room, with her two dogs, playing video games. Her mother, grandmother, and sister were all in the living room watching television. Swartz came into Jane Doe's room, played with the dogs for a while, then put them out and closed the door. He joined her playing video games, and then without saying anything, "walked over to [her] [and] pushed [her] down on the bed" and began to remove her clothes. Jane Doe said "stop" when Swartz removed her sweatpants, and again when he removed her shirt. Jane Doe did not call out, nor did she try to flee as Swartz undressed because he was "standing in front of the door." Swartz told her to be quiet and had sex with her. When it was over, Swartz put his clothes on and left the room. Jane Doe dressed herself and stayed the rest of the night in her mother's room.

An Orange County Sheriff's Department forensic scientist testified based on DNA samples taken from Swartz, Jane Doe, and Jane Doe's child, that along with one in every 600,000 males, Swartz could not be excluded as the biological father. Further, she testified it was 3,000,000 times more likely Swartz was the child's father than a random male in the population.

The jury found Swartz guilty, as charged, of forcible rape by means of force, violence, duress, menace, and fear of immediate and unlawful bodily injury occurring between July 1, 2006, and October 1, 2006 (§ 261, subd. (a)(2)), committing a lewd and

lascivious act upon a child under age 14 occurring between July 1, 2006, and October 1, 2006 (§ 288, subd. (a)), and continuous sexual abuse of a child under age 14 occurring between September 1, 2002, and June 15, 2006 (§ 288.5, subd. (a)), and it found true the great bodily injury allegation (§ 667.61, subds. (b) & (e)). The trial court sentenced Swartz to 15 years to life on the rape count, plus a consecutive 12-year-term for continuous sexual abuse, and stayed sentencing on the lewd and lascivious act count pursuant to section 654.

DISCUSSION

Count 1: Substantial Evidence of Duress

Swartz contends his count 1 conviction, which relates to the incident when he impregnated Jane Doe, must be reversed because there is insufficient evidence he accomplished the rape by means of duress. We disagree.

"When an appellant challenges the sufficiency of the evidence to support a conviction, the appellate court reviews the entire record to see '"whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt."' [Citation.] We view the facts in the light most favorable to the judgment, drawing all reasonable inferences in its support. [Citations.] We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. [Citations.] The test on appeal is not whether we believe the evidence established the defendant's guilt beyond a reasonable doubt, but whether '"'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"' [Citations.]" (*People v. Cochran* (2002) 103 Cal.App.4th 8, 12-14 (*Cochran*).)

A rape conviction under section 261, subdivision (a)(2), requires proof the rape was "accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." "'[D]uress' means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which

otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress." (§ 261, subd. (b); see *People v. Leal* (2004) 33 Cal.4th 999, 1004 (*Leal*) [similarly defining "duress" in the context of section 288].)

In appraising the existence of duress, "[o]ther relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that revealing the molestation would result in jeopardizing the family. [Citation.] [¶] The fact that the victim testifies the defendant did not use force or threats does not require a finding of no duress; the victim's testimony must be considered in light of her age and her relationship to the defendant." (*Cochran*, *supra*, 103 Cal.App.4th at p. 14.)

Swartz cites *People v. Espinoza* (2002) 95 Cal.App.4th 1287 (*Espinoza*) and *People v. Hecker* (1990) 219 Cal.App.3d 1238 (*Hecker*), in support of his contention there is insufficient evidence of duress. Both cases concluded psychological coercion without more does not establish duress; there must also be an express or implied threat of "'force, violence, danger, hardship or retribution.'" (*Hecker*, *supra*, 219 Cal.App.3d at p. 1251; see also *Espinoza, supra,* 95 Cal.App.4th at p. 1321 ["[d]uress cannot be established unless there is evidence that 'the victim['s] participation was impelled, at least partly, by an implied threat"].) Swartz argues that similar to *Hecker* and *Espinoza*, here there was no direct or implied threat of force, violence, danger, hardship, or retribution. His threats to hurt Jane Doe if she told anyone were directed at maintaining secrecy and not at actually obtaining sex; Jane Doe testified she only "kind of" believed the threats, and she did not testify any of the threats were made on the day he impregnated her. Further, Swartz contends the only fear Jane Doe appeared to exhibit was "fear of continued molestation [by him], and not fear of physical harm during the sexual activity."

We are unpersuaded. Preliminarily, courts have questioned the reasoning of *Hecker*, noting "[t]he very nature of duress is psychological coercion. A threat to a child of adverse consequences, such as suggesting the child will be breaking up the family or marriage if she reports or fails to acquiesce in the molestation, may constitute a threat of retribution and may be sufficient to establish duress, particularly if the child is young and the defendant is her parent." (*Cochran, supra,* 103 Cal.App.4th at p. 15.) And in any event, *Hecker, supra,* 219 Cal.App.3d 1238, and *Espinoza, supra,* 95 Cal.App.4th 1287, are distinguishable.

In *Hecker*, defendant began molesting his stepdaughter when she was twelve years-old. (*Hecker, supra,* 219 Cal.App.3d at p. 1241.) The victim testified she "never willingly engaged in any sex acts with [the defendant]," but he only used physical force once when he pushed her "head down during the act of oral copulation." (*Id.* at pp. 1242, 1250.) Defendant warned his victim if she disclosed their relationship to anyone it would ruin his marriage and career, and land him in jail. (*Ibid.*) He did not threaten the victim, and the victim admitted she never consciously feared he would harm her.

In *Espinoza, supra,* 95 Cal.App.4th at pages 1293-1294, defendant entered his twelve year-old daughter's room and molested her on five occasions. The victim was afraid defendant "'would come and do something'" if she reported the molestations. (*Ibid.*) "Defendant only spoke to [the victim] during one of the molests. He said 'Do you still love me' and then repeatedly said 'Please love me' . . . ." (*Id.* at p. 1295.) The appellate court reversed defendant's attempted rape conviction reasoning he, "simply lewdly touched and attempted intercourse with a victim who made no oral or physical response to his acts." (*Id.* at p. 1320.)

Swartz asserts the incident charged was simply an example of what had become a "sad routine" like the one Jane Doe recalled having occurred in November 2006, which he describes as one where he just walked into Jane Doe's room, "shut the door, played video games with her, removed her clothes, and penetrated her without a fight." But

we must add to Swartz's description precisely what the courts in *Hecker* and *Espinoza* found wanting—a history of express threats of violence. Jane Doe testified Swartz repeatedly threatened to harm her if she disclosed the abuse. True, it is unclear whether Swartz threatened Jane Doe in this manner on the night the intercourse resulting in her impregnation occurred, and Jane Doe testified she only "kind of" believed the threats. But the issue is whether those threats of violence had the effect of making a reasonable child acquiesce in his demands.

Here, Jane Doe testified she would not have engaged in the activity but for the multiple threats. She remembered Swartz was stronger than she was and he had hit her in the past. It was therefore reasonable for her to believe he would harm her if she resisted. Expressly threatened with violence, 13-year-old Jane Doe "acquiesce[d] in an act to which [she] otherwise would not have submitted." (*Leal, supra*, 33 Cal.4th at p. 1004.) Thus, even if during the commission of count 1 Swartz did not threaten Jane Doe and she did not tell him to "stop," Swartz's threats of violence in the past, and his consistent disregard for her objections, created an atmosphere in which Jane Doe said nothing because it never worked and did nothing because she reasonably believed he would harm her. This constituted duress.

We reject Swartz's distinction between a threat aimed at maintaining secrecy and one directed at obtaining compliance. "We doubt that young victims of sexual molestation readily perceive this subtle distinction. A simple warning to a child not to report a molestation reasonably implies the child should not otherwise protest or resist the sexual imposition." (*People v. Senior* (1992) 3 Cal.App.4th 765, 775-776; see also *People v. Sanchez* (1989) 208 Cal.App.3d 721, 748 (*Sanchez*), declined to follow on other grounds by *People v. Jones* (1990) 51 Cal.3d 294, 307 [among other factors, listing "repeated threats that [the victim's] mother would hit her if she told anyone" as "substantial evidence of duress supporting the convictions of child molesting by duress"].)

In *Sanchez*, *supra*, 208 Cal.App.3d 721, the court found defendant repeatedly molested his live-in granddaughter from the age of eight to 11 by means of duress. The court reasoned defendant's status as a father figure to the victim, his repeated warnings that the victim's mother would hit her if the abuse was disclosed, and his pushing her head down to facilitate oral copulation were all factors supporting a finding of duress. (*Id*. at pp. 747–748.) As in *Sanchez*, Swartz's abuse of Jane Doe began when she was eight years old. Although not her biological grandfather, he lived with her for most of her life as her grandmother's boyfriend, and the only adult male in the home. Swartz took Jane Doe on trips and spent time with her riding bicycles and going to the beach. Further, as was the case in *Sanchez*, Swartz warned Jane Doe disclosure of the abuse would result in physical harm. (*Id.* at p. 728.) And, as in *Sanchez*, where the young girl did not speak up for fear of being hit by her mother, here, Jane Doe testified she believed Swartz's threats enough that she allowed the sex to continue. (*Ibid.*) Though Jane Doe was an older victim, 13 years old when the rape causing her to become pregnant occurred, the effect of the threats was understandably the same. Every time Jane Doe told Swartz to "stop," he would continue. Swartz threatened Jane Doe with harm he would directly inflict himself, not harm inflicted by her mother or others; and Swartz had hit Jane Doe in the past.

As with the victim in *Sanchez*, Jane Doe was justified in believing the consequence of disclosure or resistance would be the infliction of physical harm because, among other things, Swartz told her as much. Thus, a jury could reasonably find Swartz accomplished the rape charged in count 1 by means of duress. (*See also Cochran*, *supra*, 103 Cal.App.4th at pp. 15-16 [duress found where defendant molested his daughter inside the family home, she was in the fourth grade and much smaller than he was, she reluctantly participated in the sexual encounters, and there was an "implicit threat that she would break up the family if she did not comply"].)

Admissibility of CSAAS Evidence

Swartz contends the trial court committed reversible error by admitting evidence of Child Sexual Abuse Accommodation Syndrome (CSAAS). We find no error.

CSAAS is a group of behaviors that commonly occur among children who have been molested and that are inconsistent with behavior people unfamiliar with the effects of molestation might expect. (*People v. Bowker* (1988) 203 Cal.App.3d 385, 389 (*Bowker*).) In this case, over defense objections, psychologist Dr. Veronica Thomas testified as an expert for the prosecution regarding CSAAS. Thomas explained there are different ways to characterize a child's response to sexual abuse suffered at the hands of someone they know as opposed to a sexual assault by a stranger. She described the five components of a child's response to such sexual abuse: (1) secrecy—reflecting the molester's "request or demand that the child not tell" about the abuse; (2) helplessness and depression—"a point in time where a child may feel as though the molesting has begun and there's really not much he or she can really do about it;" (3) entrapment and accommodation—"a psychological rationalization or . . . agreement that a child makes with . . . herself that [she's] already been involved in the sexual abuse, there's not much [she] can do about it and [she's] going to try and accommodate to it or cope with it . . . ;" (4) disclosure—the point in time when the child starts to share the experience(s) with someone else; and (5) recanting—a point usually after law enforcement has become involved and the child starts to feel responsible for negative things happening to the family (e.g., financial problems, other children being removed) and tries "to put things back to where they were before the disclosure was made."

Thomas testified it would be uncommon to see all five components in any given case and each individual child's response varies based on a number of factors, including the relationship between the child and the perpetrator, and the child's age and developmental level. As to the disclosure component, Thomas testified children might only

disclose a portion of what had occurred to "test the waters" and see how the information was going to be received before providing more details.

Swartz contends CSAAS evidence should be held inadmissible in all cases. He argues such evidence is "problematic" because the victim's responses to abuse that the CSAAS theory attempts to explain are "as consistent with false testimony as with true testimony. An alleged victim may fail to report sexual abuse because there has been no sexual abuse, rather than for reasons consistent with sexual abuse." He also argues there is a danger inherent with CSAAS evidence because a jury could easily misconstrue the testimony of a psychologist as directly corroborating the child's testimony.

But in California, while inadmissible to prove the victim was in fact sexually abused, "CSAAS testimony has been held admissible for the limited purpose of disabusing a jury of misconceptions it might hold about how a child reacts to a molestation. [Citations.] [¶] Identifying a 'myth' or 'misconception' has not been interpreted as requiring the prosecution to expressly state on the record the evidence which is inconsistent with the finding of molestation. It is sufficient if the victim's credibility is placed in issue due to the paradoxical behavior, including a delay in reporting a molestation. [Citations.]" (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1745 (*Patino*).) Furthermore, the prosecution may offer CSAAS testimony in its case-in-chief whenever the victim's testimony may raise an "obvious question . . . in the minds of the jurors," such as "why the molestation was not immediately reported if it had really occurred" or "why [the victim] went back to [the defendant's] home a second time after the first molestation." (*Id.* at p. 1745.)

California courts have repeatedly acknowledged CSAAS evidence is admissible. (See e.g., *People v. Yovanov* (1999) 69 Cal.App.4th 392, 407; *People v. Morgan* (1997) 58 Cal.App.4th 1210, 1216; *Patino, supra*, 26 Cal.App.4th at pp. 1744-1745; *People v. Housley* (1992) 6 Cal.App.4th 947, 957; *People v. Bowker*, *supra*, 203 Cal.App.3d at p. 391.) Nonetheless, Swartz urges us to reject the abundant California authority on this matter and instead adopt the reasoning of other states that exclude such

evidence in its entirety. (See, e.g., *Lantrip v. Commonwealth* (Ky. 1986) 713 S.W.2d 816, 817 [CSAAS evidence not proven to be a generally accepted medical concept or a syndrome that has attained scientific acceptance]; *Commonwealth v. Dunkle* (Pa. 1992) 602 A.2d 830, 834 [same]; *State v. Ballard* (Tenn. 1993) 855 S.W.2d 557, 561-562 [CSAAS symptoms too generic to be probative and only relevance is to credit the victim's testimony].)

But our Supreme Court has repeatedly acknowledged this *type* of evidence is admissible and "may play a particularly useful role by disabusing the jury of some widely held misconceptions" by helping juries to "evaluate the evidence free of the constraints of popular myths." (*People v. Bledsoe* (1984) 36 Cal.3d 236, 247-248 [rape trauma syndrome]; see also *People v. Brown* (2004) 33 Cal.4th 892, 905-906 [battered woman's syndrome]; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088 [same].) Indeed, in *People v. McAlpin* (1991) 53 Cal.3d 1289, 1300-1301, in ruling expert testimony regarding parental reluctance to report child molestation was admissible, the Supreme Court specifically analogized to CSAAS evidence. In short, our Supreme Court has recognized such evidence may be relevant, useful, and admissible in a given case, and we are in no position to rule otherwise. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The CSAAS evidence was properly admitted in this case. As already noted, CSAAS evidence is admissible if the victim's credibility is placed in issue "due to the paradoxical behavior, including a delay in reporting a molestation. [Citations.]" (*Patino, supra*, 26 Cal.App.4th at pp. 1744-1745.) Jane Doe testified Swartz had been sexually molesting her from age eight, yet she did not report the abuse until she became pregnant at age 13. The jury could consider Jane Doe's reporting delay when determining whether she was truthful. Indeed, Swartz attacked her credibility on this very ground, arguing in closing, "[i]f she's getting abuse from the age of eight, it strains reasonableness that she would never have told [someone] who she was close to." The People were entitled to present the CSAAS evidence to help the jury understand there was an alternate explanation.

Furthermore, the trial court appropriately admonished the jury concerning the CSAAS testimony, reading to it CALCRIM No. 1193: "You have heard testimony from [a psychologist] regarding child sexual abuse accommodation syndrome. [¶] [The psychologist's] testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not [Jane Doe's] conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of her testimony." (See *Patino, supra,* 26 Cal.App.4th at p. 1745 [court "handled the matter carefully and correctly" by giving similar admonishment].) The jury is presumed to have followed this instruction. (See *People v. Avila* (2006) 38 Cal.4th 491, 574.) Thomas did not opine on whether any of the alleged acts actually occurred, and she in fact had no familiarity with the specifics of this case. There was no error in admitting the CSAAS evidence.

DISPOSITION

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.